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LINDA S. GREEN

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SANTA ROSA DIVISION

In re

TAMALPAIS BANCORP,
fka EPIC BANCORP,

Debtor.

Case No. 10-13707 AJ

Chapter 7

LINDA S. GREEN, in her capacity as
Chapter 7 Trustee for TAMALPAIS
BANCORP, f/k/a EPIC BANCORP,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE
CORPORATION, in its capacity as
Receiver for Tamalpais Bank,

Defendant.

Adversary Proceeding No. 10-01168 AJ

**CHAPTER 7 TRUSTEE'S REPLY TO
COUNTERCLAIM OF FEDERAL DEPOSIT
INSURANCE CORPORATION AS
RECEIVER FOR TAMALPAIS BANK**

Plaintiff and counterdefendant Linda S. Green ("Trustee"), chapter 7 trustee for the
bankruptcy estate of Tamalpais Bancorp, f/k/a Epic Bancorp ("Debtor"), files this reply to the
counterclaim ("Counterclaim") by defendant Federal Deposit Insurance Corporation ("FDIC"),
and submits as follows:

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1 Bank was closed by the California Department of Financial Institutions on April 16, 2010; and
2 that the FDIC was named as the receiver of the Bank. The Trustee lacks knowledge or
3 information concerning the truth of the remaining allegations in paragraph 8, and denies these
4 allegations.

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6 9. The allegations in paragraph 9 of the Counterclaim constitute legal conclusions to
7 which no response is required, the Trustee lacks knowledge and information concerning the truth
8 of these allegations, and the phrase “stands in the shoes of” is vague and subject to varying
9 interpretations. Accordingly, the Trustee denies the allegations in paragraph 9 of the
10 Counterclaim.

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12 10. Responding to the allegations in paragraph 10 of the Counterclaim, the Trustee
13 objects to use of the phrase “stands in the shoes of,” as it is vague and subject to varying
14 interpretations. The Trustee admits that the Bank is a wholly-owned subsidiary of the Debtor.
15 The Trustee admits that she is the duly appointed, qualified and acting chapter 7 trustee of the
16 Debtor’s bankruptcy estate, and, as such, has all the rights, powers and standing as conferred on
17 her by the Bankruptcy Code and other applicable law. The Trustee denies the remaining
18 allegations in paragraph 10 of the Counterclaim.

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20 **BACKGROUND**

21 11. The Trustee admits the allegations in the first two sentences of paragraph 11 of the
22 Counterclaim. The Trustee lacks information or belief concerning the allegations in the
23 remainder of paragraph 11, and denies these allegations.

24 12. Responding to paragraph 12 of the Counterclaim, the Trustee admits that the
25 Debtor and the Bank are parties to a tax sharing agreement dated January 1, 2005. The Trustee
26 denies the remaining allegations in paragraph 12 of the Counterclaim.
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1 13. The Trustee lacks knowledge or information concerning the allegations in
2 paragraph 13 of the Counterclaim, and denies these allegations.

3 14. The Trustee lacks knowledge or information concerning the allegations in
4 paragraph 14 of the Counterclaim, and denies these allegations.

5 15. Responding to the allegations in paragraph 15 of the Counterclaim, the Trustee
6 admits that the Internal Revenue Code contains provisions addressing NOL carry-backs, the terms
7 of which speak for themselves, and denies the remaining allegations.

8 16. The Trustee admits the allegations in paragraph 16 of the Counterclaim.

9 17. The Trustee lacks information or belief concerning the allegations in the first
10 sentence of paragraph 17 of the Counterclaim, and denies these allegations. The Trustee denies
11 the remaining allegations in paragraph 17 of the Counterclaim.

12 18. Responding to paragraph 18 of the Counterclaim, the Trustee admits that the
13 Debtor filed a carry-back election and tax refund on Form 1139 Corporation Application for
14 Tentative Refund for the consolidated group, and denies the remaining allegations.

15 19. Responding to the allegations in paragraph 19 of the Counterclaim, the Trustee
16 admits that she has received a tax refund from the California Franchise Tax Board in the
17 approximate amount of \$650,000, and denies the remaining allegations.

18 20. Responding to the allegations in paragraph 20 of the Counterclaim, the Trustee
19 admits that she has received no tax refunds other than as indicated in the preceding paragraph.
20 The Trustee lacks knowledge or information concerning the remaining allegations in paragraph
21 20, and denies these allegations.

22 21. The Trustee lacks knowledge or information concerning the allegations in
23 paragraph 21 of the Counterclaim, and denies these allegations.

24 22. The Trustee denies the allegations in paragraph 22 of the Counterclaim.

1 23. The Trustee denies the allegations in paragraph 23 of the Counterclaim.

2 24. Responding to the allegations in paragraph 24 of the Counterclaim, the Trustee
3 lacks knowledge or information concerning the claims bar date referenced, and denies this
4 allegation. The Trustee denies the remaining allegations in paragraph 24 of the Counterclaim.

5 25. The Trustee lacks knowledge or information concerning the allegations in
6 paragraph 25 of the Counterclaim, and denies these allegations.

7 26. The Trustee lacks knowledge or information concerning the allegations in
8 paragraph 26 of the Counterclaim, and denies these allegations.

9 27. The Trustee lacks knowledge or information concerning the allegations in
10 paragraph 27 of the Counterclaim, and denies these allegations.

11 28. The Trustee lacks knowledge or information concerning the allegations in
12 paragraph 28 of the Counterclaim, and denies these allegations.

13 29. Responding to the allegations in paragraph 29 of the Counterclaim, the Trustee
14 admits that in her initial complaint she sought, *inter alia*, a determination that the subject tax
15 refunds constitute property of the Debtor's bankruptcy estate.

16 30. The Trustee admits the allegations in paragraph 30 of the Counterclaim.

17 31. The Trustee admits the allegations in paragraph 31 of the Counterclaim, although
18 the Trustee notes that the District Court's withdrawal order was subsequently vacated, and the
19 adversary proceeding was transferred back to the Bankruptcy Court, pursuant to an order of the
20 District Court entered April 19, 2011.

21 32. The Trustee admits the allegations in paragraph 32 of the Counterclaim, although
22 the Trustee notes that in its proof of claim the FDIC also requested that the Bankruptcy Court
23 determine whether the tax refunds are property of the Debtor's bankruptcy estate.

24 33. The Trustee admits the allegations in paragraph 33 of the Counterclaim.

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34. Responding to paragraph 34 of the Counterclaim, the Trustee incorporates the responses into the Counterclaim as if set forth in full herein.

35. The Trustee denies the allegations in paragraph 35 of the Counterclaim.

36. The Trustee denies the allegations in paragraph 36 of the Counterclaim.

37. The Trustee denies the allegations in paragraph 37 of the Counterclaim.

38. The Trustee denies the allegations in paragraph 38 of the Counterclaim.

39. The Trustee denies the allegations in paragraph 39 of the Counterclaim.

40. The Trustee denies the allegations in paragraph 40 of the Counterclaim.

41. The Trustee denies the allegations in paragraph 41 of the Counterclaim.

42. The Trustee denies the allegations in paragraph 42 of the Counterclaim.

43. The Trustee denies the allegations in paragraph 43 of the Counterclaim.

44. The Trustee denies the allegations in paragraph 44 of the Counterclaim.

45. The Trustee denies the allegations in paragraph 45 of the Counterclaim.

46. The Trustee denies the allegations in paragraph 46 of the Counterclaim.

47. The Trustee admits the allegations in paragraph 47 of the Counterclaim.

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As affirmative defenses to the claims for relief asserted in the Counterclaim, the Trustee submits as follows:

1. To the extent the FDIC seeks relief based upon FIRREA and/or other non-bankruptcy federal authorities, such relief is mooted, waived and/or obviated by the FDIC's voluntarily filing a proof of claim in the Debtor's bankruptcy case, as well as by the filing of the Counterclaim.

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1 2. To the extent the FDIC seeks relief based upon FIRREA and/or other non-
2 bankruptcy federal authorities, such relief is barred by applicable statutes of limitation and/or
3 statutes of repose.

4 3. The FDIC's contention that the tax refunds are not property of the Debtor's
5 bankruptcy estate is barred by the doctrine of waiver.

6 4. The FDIC's contention that the tax refunds are not property of the Debtor's
7 bankruptcy estate is barred by the doctrine of laches.

8 5. The FDIC's contention that the tax refunds are not property of the Debtor's
9 bankruptcy estate is barred by the doctrine of estoppel.

10 6. The FDIC's contention that the tax refunds are not property of the Debtor's
11 bankruptcy estate is barred by the doctrine of unclean hands.

12 7. The Trustee reserves the right to assert additional affirmative defenses based upon
13 further investigation, analysis and discovery.

14 **WHEREFORE**, the Trustee respectfully requests that the Court enter judgment on the
15 Counterclaim as follows:

16 1. Determining that the tax refunds are property of the Debtor's bankruptcy estate
17 pursuant to 11 U.S.C. § 541;

18 2. Determining that the FDIC has no interest in the tax refunds, and is, at most, a
19 potential general unsecured creditor of the Debtor's bankruptcy estate, in such amount as
20 determined according to proof;

21 3. Determining that the applicable taxing authorities may process and take any
22 necessary action with regard to the Tax Refunds without any participation by the FDIC;

23 4. Determining that the automatic stay applies to any action taken by the FDIC with
24 regard to the tax refunds; and
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1 5. Granting the Trustee such other and further relief as is just and proper under the
2 circumstances.

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4 Dated: April 28, 2011

DUANE MORRIS LLP

5 By: /s/ Geoffrey A. Heaton (206990)
6 GEOFFREY A. HEATON
7 Attorneys for Plaintiff and Chapter 7 Trustee
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